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1st Session

SENATE

REPORT
No. 98-226

REFORM OF FEDERAL INTERVENTION IN
STATE PROCEEDINGS ACT OF 1983

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 1763



SEPTEMBER 14 (legislative day, SEPTEMBER 12), 1983.—Ordered to be printed

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98TH CONGRESS }
1st Session }

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REFORM OF FEDERAL INTERVENTION IN STATE PROCEEDINGS ACT OF 1983

SEPTEMBER 14 (legislative day SEPTEMBER 12), 1983.—Ordered to be printed

Mr. THURMOND, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 1763]

The Committee on the Judiciary to which was referred the bill (S. 1763) to reform procedures for collateral review of criminal judgments, and for other purposes, reports favorably thereon and recommends that the bill pass.

I. GENERAL STATEMENT

The proposals that presently appear in S. 1763 were initially transmitted to Congress by the Attorney General on March 4, 1982.¹ Following transmittal, the proposals were introduced by Senator Thurmond as S. 2216 of the 97th Congress, on which a hearing was held before the full Judiciary Committee on April 1, 1982.² At that hearing testimony generally favorable to the admin-

¹ See The Administration's Proposed Reforms in Habeas Corpus Procedures (Mar. 4, 1982) (submission under cover letter of the Attorney General to the President of the Senate and the Speaker of the House of Representatives), reproduced in *The Habeas Corpus Reform Act of 1982*, Hearing on S. 2216 before the Senate Committee on the Judiciary, 97th Congress, 2d session 45-102 (1982).

The administration's proposals drew on earlier habeas corpus reform proposals introduced by Senator Thurmond and Senator Chiles as S. 653 of the 97th Congress and on similar proposals endorsed by the Attorney General's Task Force on Violent Crime. See *Habeas Corpus Procedures Amendment Act of 1981*: Hearing on S. 653 before the Subcommittee on Courts of the Senate Committee on the Judiciary, 97th Congress, 1st session (1981); Final Report of the Attorney General's Task Force on Violent Crime 58-60 (Department of Justice 1981). They differed from the earlier proposals on various points of formulation and in addressing a number of additional problems of Federal collateral review. See 128 Congressional Record S11851 (daily ed. Sept. 21, 1982) (statement of Senator Thurmond).

² See Habeas Corpus Reform Act Hearing, *supra* note 1. See generally *id.* at 16-107 (testimony and submissions by the administration explaining the proposals and their rationale).

istration's proposals was given by participants from the National Association of Attorneys General and the Conference of Chief Justices, including Attorney General Jim Smith of Florida, Chief Justice C. C. Torbert of Alabama, and Chief Justice W. Ward Reynoldson of Iowa. The proposals were later re-introduced by Senator Thurmond, with co-sponsorship by Senators Nunn and Chiles, as S. 2838 of the 97th Congress, with certain clarifying amendments resulting from the hearing on S. 2216.³

In the 98th Congress the proposals were included as title VI of S. 829, "The Comprehensive Crime Control Act of 1983," which was transmitted by the President to Congress in March of 1983.⁴ In the hearings on S. 829 testimony in support of title VI was given by Attorney General Leroy S. Zimmerman of Pennsylvania on behalf of the National Association of Attorneys General and by District Attorney Edwin L. Miller of San Diego on behalf of the National District Attorneys Association.⁵

The Committee concluded that the proposals of title VI of S. 829 are a sound approach to correction of the manifest deficiencies of the current system of Federal collateral review. The proposals were approved by the Committee on July 26, 1983, by a vote of 12 to 5 with one abstention, and were reported as S. 1763 on August 4.

NEED FOR REFORM

The writ of habeas corpus ad subjiciendum, sometimes referred to as the "Great Writ," has been regarded in the common law tradition as an important bulwark of personal liberty, assuring an individual subject to detention or confinement of a means by which judicial review of its legality can be obtained. The importance of the writ in this character was recognized by the Framers of the Constitution, who included in the Constitution the provision that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." At the time of the Constitution's enactment, however, it was universally understood that an application for habeas corpus could not be employed to secure additional review of the legality of detention imposed pursuant to the order or judgment of a

³ See generally 128 Congressional Record S11851-59 (daily ed. Sept. 21, 1982) (detailed sponsors' statement concerning S. 2838). Proposals identical to S. 2838 were also introduced in the Senate as title III of S. 2903 in the 97th Congress.

In the House of Representatives the administration's proposals were initially introduced by Representative Lungren as H.R. 6050 of the 97th Congress. They were later reintroduced in the 97th Congress by Representative Sawyer as title III of H.R. 7117 with cosponsorship by Representatives Fish, Moorhead, Hyde, Kindness, Lungren, Sensenbrenner, Shaw, Hagedorn, Solomon and Molinari.

⁴ See generally 129 Congressional Record S3147-48 (daily ed. Mar. 16, 1983) (section-by-section analysis of title VI of S. 829); *The Comprehensive Crime Control Act of 1983*, Hearings before the Subcommittee on Criminal Law of the Committee on the Judiciary, 98th Cong., 1st Sess. (1983) (statement of the Department of Justice, pp. 63-70).

The proposals have also been re-introduced in the 98th Congress by Senator Thurmond as S. 217 and S. 1763 whose collective cosponsorship includes Senators Laxalt, Nunn, Chiles, Hatch, Zorinsky, Simpson, Grassley, Domenici, Helms, Garn, Cochran and Murkowski. They have been reintroduced in the House of Representatives in the 98th Congress as title VI of H.R. 2151—the House counterpart of S. 829—and by Representative Lungren as H.R. 2238 with cosponsorship by Representatives Kindness, Livingston, Dreier of California and Corcoran.

⁵ See Crime Control Act Hearings, *supra* note 4 (statement of Attorney General Leroy S. Zimmerman, pp. 4-5; statement of District Attorney Edwin L. Miller, Jr., pp. 20-22); see also, *ibid.* (testimony of Governor Charles S. Robb on behalf of the National Governors' Association, including supportive statement on habeas corpus reform).

court of competent jurisdiction. Its function, rather, was essentially that of ensuring that an initial judicial determination could be obtained of the legality of detention pursuant to executive authority.⁶

S. 1763 is not addressed to the historical function of the Great Writ, but to the results of much later developments. Following the creation of the United States, the availability of habeas corpus in the Federal courts was initially restricted to Federal prisoners, and the common law limitations on the scope of the writ were observed. The habeas corpus jurisdiction of the Federal courts was extended by statute in 1867,⁷ however, and the traditional restrictions on the scope of the writ were gradually eroded thereafter through caselaw development. The end result of this development was that Federal habeas corpus became routinely available about thirty years ago as a means for review in the lower Federal courts of State criminal judgments on grounds of alleged deprivations of Federal rights.⁸

It is the present character of Federal habeas corpus, as a quasi-appellate jurisdiction of the lower Federal courts over State judgments, that has given rise to the problems with which S. 1763 is concerned. The shortcomings of the present system are aptly summarized in a passage from the leading treatise on Federal procedure:

The most controversial and friction-producing issue in the relation between the federal courts and the states is federal habeas corpus for state prisoners. Commentators are critical of its present scope, federal judges are unhappy at the burden of thousands of mostly frivolous petitions, state courts resent having their decisions reexamined by a single federal district judge, and the Supreme Court in recent terms has shown a strong inclination to limit its availability. Meanwhile, prisoners thrive on it as a form of occupational therapy and for a few it serves as a means of redressing constitutional violations.⁹

The disaffection of State officials, including State judges and State attorneys general, with the present system of Federal habeas corpus was amply confirmed in the course of the Committee's consideration of S. 1763 and its predecessors.¹⁰ Moreover, Federal judges have been equally emphatic in their calls for reform. Judge Henry Friendly of the Second Circuit Court of Appeals, for exam-

⁶ See Hart and Wechsler's *The Federal Courts and the Federal System* 1513 (2d ed. 1973):

"The proceedings of the Convention do not cast much direct light on just what the Framers assumed the 'privileges' of the writ to be; but it was of course the clear contemporaneous understanding that the fundamental function of the writ was to test executive detentions and that convictions by a criminal court of competent jurisdiction could not be reexamined on habeas corpus at all."

See generally *Swain v. Pressley*, 430 U.S. 372, 384-86 (1977) (Burger, C.J., concurring); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 170 (1970); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 459-68 (1966).

⁷ See generally Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965).

⁸ See *Townsend v. Sain*, 372 U.S. 293, 318 (1963); *Brown v. Allen*, 344 U.S. 443, 506-08 (1953) (Frankfurter, J., concurring). See generally William French Smith, *Proposals for Habeas Corpus Reform* in R. Rader and P. McGuigan, eds., *Criminal Justice Reform: A Blueprint* 137, 137-40, 147-50 (Free Congress Research and Education Foundation 1983); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 463-507 (1963).

⁹ Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4261, at 588 (1978).

¹⁰ See the sources cited in notes 1-2, 5 *supra*.

ple, has characterized the present system of collateral attack as "a gigantic waste of effort."¹¹ Judge Carl McGowan of the D.C. Circuit has stated similarly:

¹¹ Friendly, *supra* note 6, at 148. The accelerating scope of the general problem of prisoner petitions in the last two decades is evident from the following table:

PRISONER PETITIONS FILED IN THE U.S. DISTRICT COURTS, 12-MONTH PERIOD
ENDING JUNE 30, 1961-82

Type of petition	Fiscal year—							
	1961	1962	1963	1964	1965	1966	1967	1968
Total	2,609	2,948	4,254	6,240	7,888	8,540	10,443	11,152
By Federal prisoners.....	1,589	1,496	1,630	2,098	2,559	2,292	2,639	2,851
Motions to vacate sentence.....	560	546	595	972	1,244	863	958	1,099
Habeas corpus	868	866	862	882	974	1,107	1,045	1,045
Mandamus, etc			(³)	(³)	(³)	333	474	516
Civil rights			(³)	(³)	(³)	15	58	60
By State prisoners.....	1,020	1,452	2,624	4,142	5,329	6,248	7,804	8,301
Habeas corpus	1,020	1,408	2,106	3,694	4,845	5,339	6,201	6,488
Mandamus, etc			(¹)	(¹)	(¹)	691	725	741
Civil rights			(¹)	(¹)	(¹)	218	878	1,072

Type of petition	Fiscal year—						
	1969	1970	1971	1972	1973	1974	1975
Total	12,924	15,997	16,266	16,267	17,218	18,410	19,307
By Federal prisoners.....	3,612	4,185	4,121	4,179	4,535	4,987	5,047
Motions to vacate sentence.....	1,444	1,729	1,335	1,591	1,722	1,822	1,690
Habeas corpus	1,373	1,600	1,671	1,368	1,294	1,718	1,682
Mandamus, etc	564	720	699	700	639	631	535
Civil rights	81	136	214	252	414	445	478
By State prisoners.....	9,312	11,812	12,145	12,088	12,683	13,423	14,260
Habeas corpus	7,359	9,063	8,372	7,949	7,784	7,626	7,843
Mandamus, etc	684	92	858	791	725	561	289
Civil rights	1,269	2,657	2,915	3,348	4,174	5,236	6,128

Footnote continued on following page.

Type of petition	Fiscal year—						
	1976	1977	1978	1979	1980	1981	1982
Total	19,809	19,537	21,924	23,001	23,287	27,711	29,303
By Federal prisoners.....	4,780	4,691	4,955	4,499	3,713	4,104	4,328
Motions to vacate sentence.....	1,693	1,921	1,924	1,907	1,322	1,248	1,186
Habeas corpus	1,421	1,508	1,730	1,577	1,413	1,629	1,927
Mandamus, etc	1,164	779	665	427	375	393	381
Civil rights	502	483	636	588	603	834	834
By State prisoners.....	15,029	14,846	16,969	18,502	19,574	23,607	24,975
Habeas corpus	7,833	6,866	7,033	7,123	7,031	7,790	8,059
Mandamus, etc	238	228	206	184	146	178	175
Civil rights	6,958	7,752	9,730	11,195	12,397	15,639	16,741

¹ Included with other prisoner petitions.

Source: Compiled from the annual reports of the Administrative Office of the U.S. Courts.

A matter that has rankled relations between state and federal courts for some years now is the collateral attack on final state criminal convictions provided by Congress in the federal courts. A state prisoner who has unsuccessfully exhausted his avenues of state trial and appellate relief can, even many years later when retrial is not practically feasible, attack that conviction in the federal district court as violative of federal law, and procure his release if such a violation is established. Since the same claim of federal law violation can [be], and often is, made in the trial and appellate courts of the state, with certiorari review available in the Supreme Court, the state judges understandably have some difficulty in seeing why their work should be reexamined in the federal courts whenever a colorable claim of violation is alleged. * * *

The early finality of criminal convictions is generally desirable, and especially so when that can be assured without duplication of judicial effort. The resources of the federal courts at the present time are strained by their own criminal caseloads. They should not have to exercise a supervisory authority over the administration of state criminal laws unless that is plainly necessary in the interest of justice.¹²

Substantially the same sentiments have been expressed at the highest level of the judiciary. A majority of the Justices of the Supreme Court have strongly criticized the current system of Federal habeas corpus and have called for basic limitations on its scope and availability.¹³ Chief Justice Burger, for example, has urged Congress to consider restricting narrowly the availability of Federal habeas corpus for State prisoners, stating that "[t]he administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgments in criminal cases."¹⁴ Justice Stevens has also asserted that "[i]n recent years Federal judges at times have lost sight of the true office of the great writ of habeas corpus,"¹⁵ and Justice Powell has observed:

[T]he present scope of habeas corpus tends to undermine the values inherent in our federal system of government. To the extent that every state criminal judgment is to be subject indefinitely to broad and repetitious federal oversight, we render the actions of state courts a serious disre-

¹² McGowan, *The View from an Inferior Court*, 19 San Diego L. Rev. 659, 667-68 (1982).

¹³ See *Rose v. Lundy*, 455 U.S. 509, 546-47 (1982) (Stevens, J., dissenting); *Schnecko v. Bustamonte*, 412 U.S. 218, 250 (1973) (concurring opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.); Burger, 1981 Year-End Report on the Judiciary 21; O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 William & Mary L. Rev. 801, 814-15 (1981); Justice Lewis Powell, Address Before the A.B.A. Division of Judicial Administration, Aug. 9, 1982. See also *Schnecko v. Bustamonte*, 412 U.S. 218, 249 (1973) (Blackmun, J., concurring); *Engle v. Isaac*, 456 U.S. 107, 126-28 (1982).

¹⁴ 1981 Year-End Report on the Judiciary 21.

¹⁵ *Rose v. Lundy*, 455 U.S. 509, 546 (1982) (Stevens, J., dissenting).

spect in derogation of the constitutional balance between the two systems.¹⁶

The overall picture presented by the assessments of State judges and attorneys general, Federal judges, and leading commentators, is that of widespread dissatisfaction with the present system of Federal collateral review on grounds of federalism, proper regard for the independent stature of the State courts, the need for finality in criminal adjudication, and conservation of limited criminal justice resources. The features of the present system which give rise to the most serious difficulties on these grounds are most conveniently discussed in connection with the specific reforms of S. 1763 that are designed to correct them:

RE-ADJUDICATION OF CLAIMS PREVIOUSLY ADJUDICATED IN STATE PROCEEDINGS

The bill would establish an appropriate standard of review in habeas corpus proceedings, according deference to the results of State adjudications that are "full and fair."¹⁷ The Committee concluded that this reform is plainly warranted, and constitutes an obvious improvement over existing rules of mandatory readjudication, which result in pointless and duplicative relitigation of claims in habeas corpus proceedings that have already been fairly considered and decided by State courts at the trial and appellate levels.¹⁸ In practical terms, the present rules produce results that border on the absurd, requiring reversal of judgments many years after the normal conclusion of State proceedings on grounds that the habeas court may regard as no more than reasonable differences of opinion concerning close or unsettled questions in the interpretation or application of Federal law on which the Federal courts themselves may well disagree.¹⁹ In addition to enhancing the finality of criminal judgments and avoiding the burden on the State of retrying the petitioner which may occur when a writ is presently granted in such a case, this reform is likely to make it possible to decide cases more easily and with less extensive litigation, whether or not the petitioner would ultimately obtain relief under the current rules. A cogent illustration was provided by Chief Justice Reynoldson of Iowa in his testimony on the reform proposals:

Explore with me for a moment the anatomy of a 1975 Iowa murder trial, *State v. Moore*. Moore, who assaulted

¹⁶ *Schneekloth v. Bustamonte*, 412 U.S. 218, 263 (1973) (Powell, J., concurring).

¹⁷ This reform would be accomplished by proposed 28 U.S.C. § 2254(d) in section 5(c) of the bill. The intended interpretation of the "full and fair" standard is set out later in this Report. See notes 96-108 and accompanying text *infra*.

¹⁸ Under existing rules, State court fact-finding may be deferred to if certain poorly defined conditions are met, but the Federal habeas court must make an independent determination of the law and re-apply the law to the facts. See *Townsend v. Sain*, 372 U.S. 293 (1963); 28 U.S.C. § 2254(d).

¹⁹ See Friendly, *supra* note 6, at 165 n.125.

"My observation of the work of the excellent state courts of New York, Connecticut and Vermont does not suggest that federal determination of * * * [disputed factual issues and the application of recognized legal standards to ascertained facts] * * * is notably better [than a state court determination.] In the vast majority of cases we agree with the state courts, after a large expenditure of judges' and lawyers' time. In the few where we disagree, I feel no assurance that the federal determination is superior." (Emphasis added).

and injured a jailer at a recess, in the course of trial badgered a witness, used vulgar language, and persisted in profane and disrespectful statements to the court. After calling another recess and subsequently warning him, trial court ultimately had Moore removed from the courtroom during twenty-five minutes of an expert's testimony. In a 1979 decision, the Iowa Supreme Court ruled Moore had waived his sixth amendment right to confront the adverse witness and upheld his conviction. Our opinion quoted the relevant portion of the transcript and applied as controlling the Supreme Court's standards laid down in *Illinois v. Allen*. In 1980 a federal trial judge, ruling on Moore's application for writ of habeas corpus, set out the same portion of the transcript, found *Illinois v. Allen* to be controlling, but issued the writ. In 1981, following the State's appeal, the Eighth Circuit, again quoting the then-familiar portion of the transcript and for the third time applying *Illinois v. Allen* standards, agreed with the Iowa Supreme Court and reversed the federal district court.

Thus Moore was permitted to collaterally attack his conviction in two federal courts even though the identical issue was fairly and fully considered and decided in his state court direct appeal. This process injected over two years of uncertainty into his case after his state appeal was concluded, cost Iowa substantial resources to defend the judgment it had secured in one state court and retained in another, and risked tensions between state and federal courts in Iowa.

No one suggests federal oversight of state decisions involving federal constitutional rights should be eliminated. Adoption of * * * [the reform proposals] * * * however, would avoid many unfortunate and wasteful proceedings. For example, proposed new subsection (d) to section 2254 of title 28 provides:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in state proceedings.

Such a provision, promptly applied by the federal district judge in the Iowa case just discussed, would have terminated the *Moore* litigation in the federal courts.²⁰

CONSIDERATION OF CLAIMS NOT PROPERLY RAISED IN STATE PROCEEDINGS

A common problem in Federal habeas corpus proceedings is the propriety of entertaining a claim that the State courts refused to hear on account of the petitioner's failure to comply with a State rule of procedure. The existing rules governing the decision to entertain such claims are beset with fundamental uncertainties. In some instances the pertinent inquiry is whether the petitioner can

²⁰ Habeas Corpus Reform Act Hearing, *supra* note 1, at 232-234.

establish "cause and prejudice" in relation to the failure to raise the claim properly in State proceedings, but in others it may be whether the petitioner "deliberately bypassed" State procedures. The relative scope of application of these standards has never been definitively settled. The meaning of the "cause and prejudice" standard itself has been a source of great uncertainty and division in the lower courts.²¹ The general uncertainties in this area are heightened by indications in Supreme Court decisions that access to Federal collateral relief may also depend partially on the large and confusing body of caselaw relating to "adequate and independent state grounds" barring direct review in the Supreme Court.²²

The bill would resolve all major uncertainties concerning access to Federal collateral remedies following a failure to raise a claim properly in normal criminal proceedings, establishing "cause and prejudice" as the exclusive governing standard. The existing confusion over the meaning of "cause" would be resolved by provision of a definition normally focusing on the question of whether the State has provided an opportunity to raise Federal claims that satisfied the requirements of Federal law.²³ The Committee believes that this reform will avoid many years of additional litigation throughout the Nation that would be required to resolve the existing uncertainties through case law development, avoid inconsistency in the treatment of similar cases that would otherwise result from continuing confusion in this area, and establish a clear and properly motivated standard that affords due weight to both the protection of Federal rights and the integrity of State and Federal criminal procedures.

LIMITATION OF THE TIME FOR APPLYING FOR FEDERAL COLLATERAL RELIEF

The bill would establish a one year time limit on access to Federal habeas corpus for State prisoners, normally running from the time State remedies are exhausted.²⁴ The anomalous character of the current system, which permits collateral attack on convictions without limitation of time, has been cogently described by Justice Powell:

Another cause of overload of the federal system is 28 U.S.C. § 2254, conferring federal habeas corpus jurisdiction to review state court criminal convictions. There is no statute of limitations, and no finality of federal review of state convictions. Thus, repetitive recourse is commonplace. I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy.²⁵

²¹ See *Wainwright v. Sykes*, 433 U.S. 72, 87, 88 & n.12 (1977); Goodman & Sallett, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 Hastings L.J. 1683, 1725 (1979).

²² See *Wainwright v. Sykes*, 433 U.S. 72, 78-79, 81-87 (1977); Goodman & Sallett, *supra* note 21, at 1690-91 & n.40.

²³ These reforms would be accomplished by proposed 28 U.S.C. § 2244(d) in section 2 of the bill.

²⁴ This reform would be accomplished by proposed 28 U.S.C. § 2244(e) in section 2 of the bill.

²⁵ Address Before the A.B.A. Division of Judicial Administration, Aug. 9, 1982.

In practical terms, a prisoner who has properly exhausted State remedies will normally have presented his claims previously at the trial and appellate levels in State proceedings.²⁶ When a prisoner has done so, it is eminently reasonable to require him to delay for no more than a year before re-presenting the same claims to a Federal habeas court. The approach to time limitation taken by the bill would afford every State prisoner an opportunity to apply for Federal habeas corpus following the conclusion of the State criminal process which would be held open for a reasonable period of time. It would, however, create a means for control of the filing of petitions years or decades after the normal conclusion of criminal proceedings, when the passage of time has made reliable determination of the claims asserted or re-trial of the petitioner difficult or impossible. As Chief Justice Reynoldson of Iowa observed in his testimony on the reform proposals:

Another welcome and remedial provision in * * * [the proposals] * * * is new subsection (e) proposed to be incorporated in section 2244 of title 28, providing for a one-year limitation for habeas application. This should obviate those long-delayed applications brought after the witnesses have forgotten the facts, or died. It would avoid the necessity to expose the victims—especially rape victims—to a traumatic confrontation with the accused, dredging up memories suppressed with great difficulty.²⁷

The bill would also create, for similar purposes, a two year time limit on applications for collateral relief by Federal prisoners, normally running from finality of judgment.²⁸

The present absence of time limits on application for Federal habeas corpus and the corresponding collateral remedy for Federal prisoners reflects a failure of the procedures associated with Federal collateral relief to keep pace with its expanding scope. When habeas corpus was essentially confined to testing the legality of executive detention which had never been judicially sanctioned, the absence of a time limit was quite understandable. In relation to the present normal character of Federal habeas corpus as a means for providing additional review of the legality of detention pursuant to a criminal judgment, however, the absence of a time limit is at odds with the approach taken in other contexts by Federal law to the review or re-opening of judgments. For example, a Federal defendant must normally decide whether to appeal within 10 days,²⁹ a State defendant seeking direct review in the Supreme Court must normally apply within 90 days,³⁰ and a Federal defendant seeking re-trial on grounds of newly discovered evidence must do so within 2 years of final judgment.³¹ The last-mentioned limitation has the

²⁶ See generally Wright, Miller & Cooper, *supra* note 9, § 4264, at 625-30; P. Robinson, *An Empirical Study of Federal Habeas Corpus Review of State Court Judgments* 17 & n.18 (Department of Justice 1979).

²⁷ Habeas Corpus Reform Act Hearing, *supra* note 1, at 234-235.

²⁸ This reform would be accomplished by the proposed final paragraph to 28 U.S.C. § 2255 in section 6 of the bill.

²⁹ See Fed. R. App. P. 4(b).

³⁰ See Sup. Ct. R. 11, 22.

³¹ See Fed. R. Crim. P. 33.

particularly curious effect that a Federal prisoner who discovers proof of his innocence more than two years after final judgment has no judicial remedy, but must seek executive clemency, while a State or Federal prisoner who asserts violations of Constitutional rights which may cast no real doubt on his guilt is afforded a Federal judicial remedy without limitation of time. The time limitation rules of S. 1763 would reduce this discrepancy, bringing the availability of collateral relief into closer conformity with the approach taken by Federal law in other contexts to maintenance of orderly procedures and assurance of finality in criminal adjudication.

PROMOTING EFFICIENCY THROUGH REFORM OF THE EXHAUSTION REQUIREMENT AND THE PROCEDURE ON APPEAL

The bill would also address two issues of a more technical nature which are nevertheless important for reasons of efficiency. First, it would make it clear that a petition can be denied on the merits notwithstanding the petitioner's failure to exhaust State remedies, thereby avoiding the waste of time and effort that presently occurs when a frivolous petition is dismissed on grounds of non-exhaustion and is later brought back to the Federal court following its unsuccessful presentation to the courts of the State.³² Empirical studies indicate that this reform would ameliorate a major source of inefficiency in the current system.³³ Second, the bill would change the present rule which affords a State petitioner in a habeas corpus proceeding repetitive opportunities to persuade a district judge and then a circuit judge that an appeal is warranted. It would also bring the procedure governing access to appeal in collateral proceedings involving Federal prisoners into line with that employed in connection with State prisoners' petitions.³⁴ As Judge Friendly of the Second Circuit Court of Appeals has stated:

In view of the staggering growth in the case loads of the courts of appeals * * * Congress should move promptly to amend 28 U.S.C. § 2253 * * * so as to place the authority to issue certificates of probable cause solely in the courts of appeals and require similar authorization for appeals by federal prisoners in cases under 28 U.S.C. § 2255 * * *³⁵

In sum, the Committee believes that the proposals set out in this bill constitute a sound response to the most patent shortcomings of the present system of Federal collateral relief. They would, in the words of the Attorney General, "establish a more appropriate scope and function for federal collateral remedies without jeopardizing the legitimate protection of federal rights."³⁶

II. INTRODUCTION TO SECTION-BY-SECTION ANALYSIS

The bill proposes amendments to various sections of chapter 153 of title 28 of the United States Code and a related rule of appellate

³² This reform would be accomplished by section 5(a) of the bill, amending 28 U.S.C. § 2254(b).

³³ See Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 358-59 (1973); P. Robinson, *supra* note 26, at 19-20.

³⁴ The reforms in appeal procedure would be accomplished by section 3 of the bill, amending 28 U.S.C. § 2253, and section 4 of the bill, amending Fed. R. App. P. 22.

³⁵ Friendly, *supra* note 6, at 144 n.9.

³⁶ Habeas Corpus Reform Act Hearing, *supra* note 1, at 48.

procedure in order to establish a more appropriate scope and function for Federal habeas corpus for State prisoners, accord more appropriate weight to State interests in finality and orderly procedures in criminal adjudication, improve the efficiency of habeas corpus litigation and appellate review in such litigation, and effect certain corresponding improvements in the operation of collateral remedies for Federal prisoners. The proposed amendments would change the operation of Federal collateral remedies in several respects:

First, the proposed amendments would preclude granting relief with respect to matters that have been fully and fairly adjudicated in State proceedings in order to enhance the finality of State criminal adjudications and avoid duplicative litigation of claims that have already been adequately considered and decided.

Second, the proposed amendments would generally bar cognition of claims that have not been properly raised in State proceedings, provided the State has afforded the petitioner an opportunity consistent with the requirements of Federal law to raise his claims in the State proceedings.

Third, the proposed amendments would establish a one-year limitation period for the filing of habeas corpus petitions by State prisoners, which would generally run from the time of exhaustion of State remedies. This limitation period would discourage or prevent the filing of petitions when the passage of time has made reliable adjudication of the petitioner's claims or re-trial of the petitioner difficult or impossible. The limitation period would also advance the policies supporting finality and repose in criminal adjudication.

Fourth, the proposed amendments would clearly state that a Federal habeas court can deny a petition on the merits without requiring prior exhaustion of State remedies, thereby avoiding the waste of judicial resources that results when a person presenting a frivolous petition is sent back to the State courts to exhaust State remedies.

Fifth, the proposed amendments would vest in the judges of the courts of appeals exclusive authority to issue certificates of probable cause for appeal in habeas corpus proceedings. This would entrust the decision concerning the propriety of an appeal to the judges who are in the best position to determine if there is a realistic likelihood of reversal. It would also avoid duplicative consideration of the suitability of a case for appeal, first by a district judge, and then by a circuit judge.

Sixth, the proposed amendments would make similar changes in the law governing applications for collateral relief by Federal prisoners pursuant to 28 U.S.C. § 2255 in the areas of appeal, procedural default and time limitation.

III. SECTION 1 OF THE BILL—POPULAR NAME

Section 1 of the bill states that the Act may be cited as the "Reform of Federal Intervention in State Proceedings Act of 1983."

IV. SECTION 2 OF THE BILL—PROPOSED AMENDMENTS TO 28 U.S.C. § 2244 RELATING TO PROCEDURAL DEFAULTS IN STATE PROCEEDINGS AND THE TIME FOR FILING APPLICATIONS FOR HABEAS CORPUS

Section 2 of the bill would add two new subsections to 28 U.S.C. § 2244. The first new subsection would clarify the law concerning consideration of a claim by a Federal habeas court if the petitioner has not complied with State procedural rules directing when or how a claim must be raised in State proceedings. The second new subsection would establish a one-year limitation period for State prisoners' applications for Federal habeas corpus. The limitation period would run in most cases from the time at which State remedies have been exhausted.

A. THE EFFECT OF PROCEDURAL DEFAULTS

In both the State and Federal systems, many procedural rules exist which result in the forfeiture of claims for purposes of subsequent proceedings if they are not raised at a certain time or in a certain manner. In a typical jurisdiction such rules may include, for example, requirements that challenges to grand jury composition or to the seizure of evidence be made before trial;³⁷ provisions that most other claims cannot be raised initially on appeal or collateral attack, where they were not raised at trial;³⁸ and provisions that claims which could have been raised on appeal but were not are forfeited for purposes of subsequent collateral proceedings. A defendant's failure to comply with such a rule, together with the absence of any exception to the rule's operation applicable to the particular case, is referred to as a "procedural default." The effect of a procedural default in State proceedings on the subsequent availability of Federal collateral relief has been a perennial problem in Federal habeas corpus procedure.

Under current law, this issue is governed by two principal cases: *Fay v. Noia*³⁹ and *Wainwright v. Sykes*.⁴⁰ In *Fay*, the Supreme Court held that a Federal habeas court could decline to hear a claim if the petitioner "deliberately bypassed" state procedures. In *Wainwright*, however, the Court held that certain types of procedural defaults would not be excused unless a more exacting standard is satisfied—the petitioner must establish "cause" for the default and "actual prejudice" resulting from the failure of the state court to hear the claim.

Proposed subsection (d) of 28 U.S.C. § 2244 addresses the subject of procedural defaults presently governed by *Fay* and *Wainwright*.⁴¹ It would codify the requirements of "actual prejudice" and "cause," and provide that "cause" exists only if one of three conditions is satisfied. It would, moreover, establish "cause and

³⁷ See, e.g., Fed. R. Crim. P. 12(b), (f) (claims of defects in institution of prosecution and motions to suppress evidence are waived if not raised before trial, unless court grants relief from waiver for cause shown).

³⁸ See, e.g., *United States v. Frady*, 456 U.S. 152, 162-66 (1982); *United States v. Atkinson*, 297 U.S. 157, 159-60 (1936) (discussion of rule that claims of trial error not raised at trial will not be heard on appeal except in cases of plain error).

³⁹ 372 U.S. 391 (1963).

⁴⁰ 433 U.S. 72 (1977).

⁴¹ In line with this intent, the reference to "State rules of procedure" in proposed 28 U.S.C. § 2244(d) should be understood to refer to the totality of the state's procedural requirements, including caselaw requirements as well as codified rules and statutes.

prejudice" as the exclusive standard governing the effect of procedural defaults,⁴² thereby resolving a number of other uncertainties under current law.

1. "Actual prejudice" and "cause"

Under current law, the "actual prejudice" requirement of *Wainwright v. Sykes* has generally been treated as a variant of the harmless error doctrine of *Chapman v. California*.⁴³ Under this approach, the petitioner must establish reasonable doubt that the conviction, sentence or other disposition complained of would have occurred in the absence of the alleged error underlying his claim.⁴⁴ The Committee approves of this interpretation of the "actual prejudice" requirement, and intends that the "actual prejudice" requirement of proposed subsection (d) be understood in the same sense.

The requirement of "cause," by contrast, has been a source of great uncertainty and division in the lower Federal courts.⁴⁵ Proposed subsection (d) would replace these fundamental uncertainties with a uniform standard whose definition is set out in three clauses.

The central inquiry is set out in clause (1) of the definition, which allows "cause" to be found if "the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States." The notion reflected in the standard is essentially one of estoppel. If the claim was not raised in State proceedings as a result of State action in violation of federal law, the State should not be heard to complain if the deficiency is made up by consideration of the claim in subsequent habeas corpus proceedings. But if the state has provided an opportunity consistent with its obligations under Federal law to raise federal claims in its criminal proceedings, and the opportunity has not been taken, then the State's lawful procedural requirements should not be disregarded or overridden in a subsequent Federal habeas corpus proceeding.

The main practical significance of this standard is in connection with attorney error or misjudgment, which is the ground normally advanced as "cause" for a procedural default.⁴⁶ Under the standard of proposed subsection (d)(1), attorney error in failing to raise a claim properly would qualify as "cause" if it was sufficiently serious to deprive the petitioner of Constitutionally effective assistance of counsel, since in such a case the default would be the result of the State's failure, in violation of the sixth amendment to the Constitution, to afford the petitioner the effective assistance of coun-

⁴² Proposed subsection (d) is not, however, meant to change existing rules concerning the availability of federal habeas corpus to prisoners who have pleaded guilty and assert claims of "antecedent" violations of Federal rights. The effect of guilty pleas is a distinct question from the effect of procedural defaults, which is governed by a distinct line of cases. See *Tollett v. Henderson*, 411 U.S. 258 (1973); *McMann v. Richardson*, 397 U.S. 759 (1970).

⁴³ 386 U.S. 18 (1967).

⁴⁴ See *United States v. Frady*, 456 U.S. 152, 168-75 (1982) (no "prejudice" from allegedly erroneous jury charge given absence of substantial likelihood that disposition of case would have differed); Goodman & Sallett, *Wainwright v. Sykes: The Lower Federal Courts Respond*, 30 *Hastings L.J.* 1683, 1707, 1724 (1979) (lower federal courts have generally approached "prejudice" inquiry as variant of harmless error analysis).

⁴⁵ See Goodman & Sallett, *supra* note 44, at 1725.

⁴⁶ See *id.*

sel.⁴⁷ But less serious forms of error or misjudgment—which even the most able attorney will sometimes engage in, given the complexities and pressures of criminal litigation—would not qualify as “cause.”

In relation to current law, this approach would adopt uniformly the rule of *Indiviglio v. United States*, in which the Second Circuit Court of Appeals held that attorney error falling short of Constitutional ineffectiveness does not qualify as “cause.”⁴⁸ It can also be compared to the special rules governing access to Federal habeas corpus in guilty plea cases. For such cases the Supreme Court has held that a petitioner generally cannot raise in habeas corpus proceedings claims of violations of Federal rights occurring prior to a guilty plea, but is required to establish that he was denied the effective assistance of counsel in connection with the plea.⁴⁹

In addition to the basic standard set out in clause (1), proposed subsection (d) would recognize two other grounds of “cause.” Clause (2) of subsection (d) would establish “cause” where “the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable.”

The application of such a standard is illustrated by the decision of the Supreme Court in the case of *Engle v. Isaac*.⁵⁰ In that case the petitioner attacked the allocation of the burden of proof on the defense of self-defense in his state trial, citing Supreme Court decisions concerning the right to proof beyond a reasonable doubt in criminal cases. The Court intimated that “cause” could be based on subsequent recognition of a right in appropriate cases.⁵¹ It found no “cause” in the case presented, however, on the ground that there had been sufficient recognition of the right asserted in the case of *In Re Winship*, which had been decided some years prior to the petitioner’s trial, notwithstanding the further elaboration and application of the right in later cases cited by the petitioner.⁵² This

⁴⁷ See *Cayler v. Sullivan*, 446 U.S. 335, 342–45 (1980) (unanimous holding that ineffectiveness of counsel, whether retained or appointed, involves state action); *id.* at 344 (“The right to counsel prevents the state from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.”).

With respect to the interpretation of the sixth amendment requirement of effective assistance of counsel, see *Indiviglio v. United States*, 612 F.2d 624, 632 (1979) (Mansfield, J., concurring), and cases cited therein.

⁴⁸ See 612 F.2d 624, 631 (1979): “Without some showing that counsel’s mistakes were so egregious as to amount to a Sixth Amendment violation, a mere allegation of error by counsel is insufficient to establish ‘cause’ to excuse a procedural default.” Cf. *Engle v. Isaac*, 456 U.S. 107, 134 (1982): “We have long recognized . . . that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.”

⁴⁹ See *Tollett v. Henderson*, 411 U.S. 258 (1973); *McMann v. Richardson*, 397 U.S. 759 (1970). See generally Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 Yale L.J. 1035, 1069–71 (1977).

Under both the present guilty plea rules and the approach of proposed 28 U.S.C. § 2244(d), a question is raised of whether certain claims will be heard in a habeas corpus proceeding, and the central role in answering this question is assigned to the determination of whether an attorney’s failure to pursue such claims in state proceedings was so far amiss as to render his assistance Constitutionally ineffective. Specifically, under *Tollett v. Henderson*, supra, a petitioner must show that his attorney’s advice to him to plead guilty, notwithstanding the existence of possible antecedent violations of federal rights, deprived him of the effective assistance of counsel. To meet the “cause” standard of proposed 28 U.S.C. § 2244(d), a petitioner would normally have to show that his attorney’s failure to raise a claim in conformity with state procedural rules deprived him of the effective assistance of counsel.

⁵⁰ 456 U.S. 107 (1982).

⁵¹ See *id.* at 131.

⁵² In support of this conclusion, the Court noted that many other defendants had raised comparable claims following the decision in *In Re Winship*, and that it accordingly could not be

Continued

approach to "cause" in connection with claims asserting newly recognized rights is fully consistent with the intended interpretation of proposed subsection (d)(2), which is meant to allow claims to be raised which are based on the subsequent recognition by the Supreme Court of retroactive rights that are truly novel, but not to allow claims based on subsequent decisions which only elaborate on the interpretation or application of rights for which a basis can be found in earlier decisions. The Committee approves of the approach to the distinction of such cases taken by the Supreme Court in *Engle v. Isaac*, and intends that the "new rights" provision of proposed subsection (d)(2) be understood in the same sense.

The third ground of "cause" is set out in clause (3) of proposed subsection (d) which would allow "cause" to be found where "the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default." This provision is essentially self-explanatory, and is comparable to "reasonable diligence" or "due diligence" standards that appear in other contexts in federal law. For example, the Supreme Court has employed such a standard in interpreting the "cause shown" exception to Rule 12 of the Federal Rules of Criminal Procedure.⁵³

2. Resolution of other uncertainties in current law

The opinion in *Wainwright v. Sykes* left open the question of which categories of defaults would be subject to its "cause and prejudice" standard rather than the more permissive "deliberate bypass" standard of *Fay v. Noia*.⁵⁴ In the absence of authoritative guidance from the majority opinion, lower courts have tended to rely on the Chief Justice's concurrence in *Wainwright*, which stated that the *Fay* standard should continue to apply to certain basic decisions that are ordinarily made by the defendant rather than his attorney, such as the decision whether to plead guilty, waive a jury, take the witness stand, or pursue an appeal.⁵⁵

The Committee believes that it is preferable to employ the "cause and prejudice" standard as the exclusive standard governing the excuse of procedural defaults in habeas corpus proceedings. As formulated in the bill, it is sufficiently flexible to give appropriate weight to the distinctions noted in the Chief Justice's concurrence. Insofar as decisions normally committed to the personal choice of the defendant tend to be of basic importance to the further conduct of a case, poor advice by counsel in relation to such decisions is more likely to render his assistance Constitutionally ineffective, providing "cause" in the sense of proposed subsection (d)(1).

In practical terms, decisions normally committed to the personal choice of the defendant that may result in the forfeiture of Federal claims are likely to be the decision whether to plead guilty and the

concluded that the respondents "lacked the tools to construct their constitutional claim." See 456 U.S. at 131-33.

⁵³ See *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362-63 (1963) ("cause shown" exception not applicable because "the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial").

⁵⁴ See 433 U.S. at 88 & n. 12.

⁵⁵ See 433 U.S. at 91-94 (Burger, C. J., concurring); Goodman & Sallett, *supra* note 44, at 1689-90.

decision whether to pursue an appeal. The effect of the decision to plead guilty on access to Federal habeas corpus is already governed by special caselaw rules, focusing on the effectiveness of counsel's assistance, which are similar to the basic default rule of proposed subsection (d) and would not be changed by enactment of the bill.⁵⁶ The decision concerning appeal can also be appropriately handled under this type of standard. If an "effectiveness of counsel" standard is adequately protective of defendants' interests in connection with guilty pleas—which normally result in forfeiture of the possibility of raising Federal claims both at trial and on appeal—such a standard would also seem adequately protective in connection with decisions not to appeal, which only result in forfeiture of the possibility of raising Federal claims on appeal.

A further uncertainty that would be resolved by proposed subsection (d) is the relationship between the cause and prejudice standard and the doctrine of Supreme Court practice which holds that the existence of an adequate and independent State ground will bar Supreme Court review. In *Wainwright*, the Court undertook a preliminary inquiry as to whether the default at issue gave rise to an adequate and independent State ground that would bar direct review in the Supreme Court.⁵⁷ There is, however, no reason in policy why the availability of collateral relief in the lower Federal courts should be coordinated to the availability of direct review in the Supreme Court, and doing so would pointlessly complicate and render uncertain decisions concerning the excuse of procedural defaults in habeas corpus proceedings.⁵⁸ Hence, no determination of whether a procedural default gave rise to an adequate and independent State ground that would bar direct review in the Supreme Court is required under the standard of proposed subsection (d).⁵⁹

B. LIMITATION OF TIME FOR FILING

Proposed subsection (e) of 28 U.S.C. § 2244 would impose a one year time limit on applications for Federal habeas corpus.⁶⁰ The

⁵⁶ See note 42, *supra*; note 49 and accompanying text *supra*.

⁵⁷ See 433 U.S. at 78-79, 81-87.

⁵⁸ See Goodman & Sallett, *supra* note 44, at 1691 & n.40.

⁵⁹ The caselaw relating to the "adequate and independent State ground" requirement is characterized by a lack of clear standards and principles. A valid function of a more definite nature that can be abstracted from this caselaw is that of assuring that a State court cannot bar federal review by means of a procedural dismissal of a claim that amounts to a violation of due process or that masks defiance of federal rights in violation of the State court's obligations under the Supremacy Clause. See Hart and Wechsler's *The Federal Courts and the Federal System* 544-47 (2d ed. 1973); *Rogers v. Alabama*, 192 U.S. 226 (1904). The standard of proposed subsection (d)(1) would automatically be satisfied in such a case, however, since in such a case the failure of the claim to be heard in State proceedings would be the result of State action in violation of Federal law.

⁶⁰ There is currently no time limit on application for Federal habeas corpus. Rule 9(a) of the habeas corpus procedural rules—a "laches" provision—provides that a petition may be dismissed if the State has been prejudiced in its ability to respond to the petition by delay in filing, unless the petition is based on grounds which could not reasonably have been discovered prior to the prejudicial occurrence. See 28 U.S.C. foll. § 2254. On account of its discretionary character and other limitations, Rule 9(a) has not been an effective check on belated petitions. See, e.g., *Spalding v. Aiken*, 103 S. Ct. 1795 (1983) (district judge attempting to dismiss petition under Rule 9(a) twice reversed on appeal, where triple-murderer filed petition fourteen years after conviction asserting claims previously raised and rejected in state appeal); Letter of Attorney General Frank J. Kelley of Michigan to Attorney General William French Smith (July 28, 1982): "The State of Michigan currently has the dubious distinction of housing the nation's third largest incarcerated inmate population. One result of this phenomenon is a corresponding large volume of * * * federal habeas corpus * * * [litigation including] * * * twelve hundred applications filed in Michigan since 1977 * * *. It is noteworthy that despite the existence of Rule 9(a) I am unaware of any district court dismissal of a habeas petition based on laches."

general rule that the limitation period runs from the time State remedies are exhausted is set forth in clause (1) of subsection (e). Clauses (2)-(4) create exceptions to this general rule, which parallel the definition of "cause" in proposed 28 U.S.C. § 2244(d).

The notion of "exhaustion of State remedies" appears in current statutory law as 28 U.S.C. § 2254(b), which would be reenacted with some amendment by section 5(a) of this bill. The general rule is that State remedies have been exhausted with respect to a claim if it has once been properly presented to the highest court of a State, either on direct review or on collateral attack.⁶¹ The Supreme Court has also held that State remedies are exhausted with respect to a claim at finality of judgment if state law bars raising the claim on collateral attack and it has not been raised prior to finality of judgment.⁶² Finally, the Committee intends that State remedies be regarded as exhausted in the pertinent sense if a State places a time limit on access to its collateral remedies, either in general or with respect to certain classes of cases or claims, and the defendant has not pursued State remedies within the time allowed.⁶³ This would ensure the effectiveness of State limitation rules guarding against excessive delay by defendants in exhausting State remedies.⁶⁴ If the state limitation period expired and the defendant had not pursued State remedies, Federal habeas corpus would become unavailable a year beyond that point.⁶⁵

Clause (2) of proposed subsection (e) defers the starting point of the limitation period if a defendant was prevented from filing by state action in violation of Federal law. This exception would be applicable, for example, if State prison officials unlawfully prevented prisoners from seeking Federal collateral relief.⁶⁶ The exception reflects the same estoppel notion as the corresponding clause in the definition of "cause."⁶⁷

Clause (3) of proposed subsection (e) creates an exception for claims asserting "newly recognized rights." The remarks concerning the intended interpretation of the corresponding "new rights" clause in the definition of "cause" are equally applicable in this context.⁶⁸

⁶¹ See Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4264, at 627-28 (1978).

⁶² See *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982).

⁶³ In case a state has replaced the traditional bifurcated system of direct review and collateral attack with a unitary system of review, either in general or in connection with certain types of cases or claims, the expiration of the time for seeking such unitary review would have the same effect. See note 78 and accompanying text *infra*.

⁶⁴ See generally Shapiro, *supra* note 33, at 360-61 (1973) (noting value of time limits on State collateral remedies).

The accompanying textual discussion relates to the most common situation in which a petitioner attacks the validity of a State criminal judgment or sentence. In situations where a prisoner challenges administrative action affecting the fact or duration of confinement, see *Preiser v. Rodriguez*, 411 U.S. 475 (1973), exhaustion would be defined correspondingly as occurring when the claim has once been properly presented at the highest level of review afforded in the State system or no State remedy remains open for assertion of the claim.

⁶⁵ The "borrowing" of State limitation periods for purposes of determining the availability of Federal remedies has parallels in various other areas of Federal law. For example, in civil suits for violations of Federal rights pursuant to 42 U.S.C. § 1983, the limitation period applicable to corresponding State remedies is looked to to determine the time within which the Federal remedy of § 1983 may be pursued. See *Beard v. Stephens*, 372 F.2d, 685, 688 (5th Cir. 1967).

⁶⁶ See *Ex Parte Hull*, 312 U.S. 546 (1941). See generally Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 21-22 (1956).

⁶⁷ Proposed subsection (d)(1) of 28 U.S.C. § 2244.

⁶⁸ See text accompanying notes 50-52 *supra*.

Clause (4) states a final ground for deferring the commencement of the limitation period, where the factual predicate of the claim could not have been discovered earlier through the exercise of reasonable diligence. Use of a reasonable diligence standard in fixing the starting point of a limitation period is, of course, found in a number of areas of Federal law. For example, in relation to actions based on certain types of securities violations, 15 U.S.C. § 77m provides: "No action shall be maintained to enforce any liability * * * unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence. * * *" As noted earlier, "reasonable diligence" or "due diligence" standards are also employed in other ways in the application of procedural bars in Federal law, such as the "cause shown" standard of Fed. R. Crim. P. 12⁶⁹ and the case law rules governing motions for new trials on grounds of newly discovered evidence under Fed. R. Crim. P. 33.⁷⁰

The starting points specified by the clauses of proposed subsection (e) are meant to be applied on a claim-by-claim basis. If, for example, a petition raised two claims, A and B, of which A was time-barred by the normal operation of proposed subsection (e), but B was timely because it was based on recently discovered facts as described in clause (4), the timeliness of B would not excuse the petitioner's failure to raise A at the proper time. The habeas corpus court could consider claim B but not claim A.

V. SECTION 3 OF THE BILL—PROPOSED AMENDMENTS TO 28 U.S.C. § 2253 RELATING TO APPEAL IN FEDERAL COLLATERAL PROCEEDINGS

Section 3 of the bill would amend 28 U.S.C. § 2253 to vest in the judges of the courts of appeals exclusive authority to issue certificates of probable cause for appeal in habeas corpus proceedings. It would also create an identical certificate requirement for appeals by Federal prisoners in collateral relief proceedings pursuant to 28 U.S.C. § 2255.⁷¹

Under current law, to appeal a district court's adverse decision on his petition, a petitioner is required to obtain a certificate of probable cause from either the district judge or an appellate judge. The requirement of a certificate is designed to avoid the burden of a decision on the merits by an appellate panel in the absence of a prior determination by a district or appellate judge that some basis for the appeal exists.⁷²

While this general approach is desirable and promotes efficiency, it is inefficient in its specific provision that either a district judge

⁶⁹ See note 53 and accompanying text *supra*.

⁷⁰ See Wright, *Federal Practice and Procedure: Criminal* § 557, at 515-16, 520-22 (1969) (in motion for new trial based on newly discovered evidence made more than 7 days after verdict, relief is unavailable if the defense did not show due diligence to learn of the evidence).

⁷¹ The amendments of section 3 of the bill have been proposed by Judge Friendly of the Second Circuit Court of Appeals. See Friendly, *supra* note 6, at 144 n.9 (1970). They have also appeared in habeas corpus reform legislation considered in earlier Congresses. See S. 3833, 92d Cong., 2d Sess. (1972).

⁷² For general discussion of the certificate requirement, see Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4268, at 715-16 (1978); Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 351-54 (1968); *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1192-95 (1970); P. Robinson, *supra* note 26, at 34-36.

or an appellate judge may issue the required certificate. Denial of a certificate by the district court does not preclude the petitioner from subsequently applying to the appellate court for the certificate, requiring an appellate judge to take a second look at the case's suitability for appeal.⁷³ If the district court does issue a certificate, the judges of the appellate court are not free to override the district court's determination, but must hear the appeal. This feature of the present system is anomalous, since it is the judges of the appellate court who are in the best position to assess whether there is a realistic possibility of reversal that would warrant issuing a certificate of probable cause.⁷⁴

Section 3 of the bill would eliminate these inefficiencies by assigning the probable cause determination in connection with habeas corpus appeals exclusively to the judges of the courts of appeals.

Although there is no certificate requirement presently imposed upon appeals by federal prisoners from district court denials of § 2255 motions, a certificate requirement is equally desirable in that context. Like habeas corpus petitions by State prisoners, motions pursuant to § 2255 seldom raise genuine issues. Given the high number of frivolous motions, a requirement that § 2255 appeals satisfy a probable cause determination is an appropriate threshold for a movant to meet before his appeal will be heard by an appellate panel. The amendments of section 3 would impose such a requirement.

VI. SECTION 4 OF THE BILL—PROPOSED AMENDMENTS TO FEDERAL RULE OF APPELLATE PROCEDURE 22

Section 4 of the bill would amend Federal Appellate Rule 22 to bring it into conformity with the amendments to 28 U.S.C. § 2253 proposed in section 3.

VII. SECTION 5 OF THE BILL—PROPOSED AMENDMENTS TO 28 U.S.C. § 2254 RELATING TO EXHAUSTION OF STATE REMEDIES, READJUDICATION OF MATTERS PREVIOUSLY ADJUDICATED IN STATE PROCEEDINGS, AND PRESUMED CORRECTNESS OF STATE COURT FACTUAL DETERMINATIONS

Section 5 of the bill would add a new subsection to 28 U.S.C. § 2254 and amend two existing subsections of that section. It would amend subsection (b) of § 2254 to clarify that a Federal habeas corpus court can deny a petition on the merits notwithstanding the petitioner's failure to exhaust State remedies. It would add a new

⁷³ Available empirical data indicates that this often occurs. See P. Robinson, *supra* note 26, at 34.

⁷⁴ See Friendly, *supra* note 6, at 144 n.9:

"In 1969, collateral attacks by state prisoners * * * and by federal prisoners * * * comprised more than 20 percent of all appeals from district courts * * * [T]he state prisoner figures * * * include cases where the district court has issued a certificate and * * * the court of appeals has been obliged to hear the appeal although it believed the certificate was improvidently issued. * * * In view of the staggering growth in the case loads of the courts of appeals * * * Congress should move promptly to amend 28 U.S.C. § 2253 * * * so as to place the authority to issue certificates of probable cause solely in the courts of appeals. * * * This is the opposite of the solution proposed in [a student article * * *]. While the authors profess concern over 'the time spent on deciding whether to issue a certificate,' any judge could have told them how small this is as compared to the time spent in hearing an appeal and the burden on assigned counsel of having to argue a hopeless case."

subsection—proposed subsection (d)—that would require deference to State court determinations on matters that have been fully and fairly adjudicated in State proceedings. Finally, it would redesignate current subsection (d) as subsection “(e)” and shorten it, clarify it and conform it to proposed new subsection (d). The remaining subsections of 28 U.S.C. § 2254 are carried forward without change, except for redesignation of current subsections (e) and (f) as “(f)” and “(g)” respectively.

A. THE REQUIREMENT OF EXHAUSTION OF STATE REMEDIES

1. Interpretation of the exhaustion requirement

Section 5(a) of the bill re-enacts the current language of 28 U.S.C. § 2254(b)—which states the basic requirement of exhaustion of State remedies as a prerequisite to the granting of relief in a habeas corpus proceeding—and adds a second sentence to § 2254(b) stating that exhaustion is not a prerequisite to the denial of relief. In re-enacting the basic exhaustion requirement, the Committee intends that the notion of exhaustion be understood as follows:⁷⁵

First, the bill would perpetuate the basic rule adopted by the Supreme Court in *Brown v. Allen* that State remedies are exhausted when a claim has once been properly presented to the highest court of the State, either on direct review or on collateral attack.⁷⁶

Second, the bill would perpetuate the rule adopted by the Supreme Court in *Engle v. Isaac* that State remedies are exhausted at finality of judgment when a claim has not been raised prior to finality and State law bars raising the claim on collateral attack.⁷⁷ This rule presumably reflects the futility of sending a prisoner back to State court to “exhaust state remedies” when no state remedies remain open for the assertion of his claim.

Third, the Committee intends that State remedies be regarded as exhausted if a State places a time limit on access to its collateral remedies which is applicable to a claim, and the remedies have not been pursued within the time allowed. This situation is indistinguishable in principle from the case addressed by the Supreme Court in *Engle v. Isaac*: If State collateral remedies are no longer open for the assertion of a claim on account of the expiration of a time limit, it would be futile to send a petitioner back to State court to exhaust State remedies.⁷⁸

The Committee also intends, in re-enacting 28 U.S.C. § 2254(b), to resolve a problem occasioned by the Supreme Court’s decision in the case of *Rose v. Lundy*.⁷⁹ In *Lundy* four Justices sought to fash-

⁷⁵ Under the bill—as under current law—the notion of exhaustion of State remedies defines the initial point at which a State prisoner may properly apply for Federal habeas corpus. In light of proposed 28 U.S.C. § 2244(e) in section 2 of the bill, it would also define the normal starting point for the one-year limitation period for habeas corpus petitions. See notes 60-65 and accompanying text *supra*. For the interpretation of the exhaustion requirement in connection with challenges to administrative action affecting confinement, see note 64 *supra*.

⁷⁶ See *Brown v. Allen*, 344 U.S. 443, 448-49 n.3 (1953); Wright, Miller & Cooper, *supra* note 61, § 4264 at 627-28 (1978).

⁷⁷ See *Engle v. Isaac*, 456 U.S. 107, 125-26 n.28 (1982).

⁷⁸ See *id.* (“Section 2254(b) requires habeas applicants to exhaust those remedies ‘available in the courts of the State.’ This requirement . . . refers only to remedies still available at the time of the federal petition.”).

On the same rationale, it is intended that State remedies be regarded as exhausted under a unitary review system if the time for seeking such review has expired and review has not been sought. See note 63 *supra*.

⁷⁹ 455 U.S. 509 (1982).

ion a "one-petition rule" under which a petition containing both exhausted and non-exhausted claims would be dismissed and the petitioner would be forced to make an election between (i) holding off from re-filing until State remedies had been exhausted with respect to all the claims, or (ii) re-filing the exhausted claims only, but facing a dismissal for abuse of the writ if the remaining claims were filed separately at a later point. A majority of the Justices supported the view that a petition containing both exhausted and non-exhausted claims must be dismissed, but a different majority rejected the view that re-filing the exhausted claims would prejudice the later assertion of the remaining claims.⁸⁰

The effect of this curious split decision is that dismissal of a "mixed" petition is required, but no penalty attaches to immediately re-filing exhausted claims. In comparison with the predominant approach of the courts of appeals prior to *Lundy*—under which a habeas court could proceed to consider the exhausted claims in a petition and was only required to dismiss the unexhausted claims⁸¹—this obliges the court to go through the pointless formality of dismissing the whole petition and requires the petitioner to go through the equally pointless formality of amending or re-filing so that his petition presents only exhausted claims. The effect is additional work for both courts and petitioners with no gain in controlling repetitive filing. It is the Committee's intent that the exhaustion requirement of 28 U.S.C. § 2254(b) in section 5(a) of the bill be applicable on a claim-by-claim basis, consistent with the practice of a large majority of the courts of appeals prior to *Rose v. Lundy*.

2. Denial on the Merits Without Exhaustion

Section 5(a) of the bill would add a second sentence to 28 U.S.C. § 2254(b) making it clear that a petition can be denied on the merits without requiring prior exhaustion of state remedies. While this is not literally precluded by the current language of § 2254(b),⁸² it appears that exhaustion is generally regarded as a prerequisite to a disposition on the merits whether favorable or unfavorable.

This approach carries substantial costs. It is generally recognized that a large proportion of habeas corpus applications by State prisoners are frivolous. If a frivolous petition is dismissed on the procedural ground that State remedies were not exhausted, the prisoner is, in effect, being told to re-petition the Federal court after he has run through the State judicial process. After presenting his frivolous claims to two or three State courts, he may return to the Federal court only to be informed that his claims are without merit. The Federal court has had to consider his petition twice, first on the exhaustion issue⁸³ and then on the merits; State courts at sev-

⁸⁰ Habeas Corpus Reform Act Hearing, *supra* note 1, at 37-38.

⁸¹ See *Rose v. Lundy*, 455 U.S. 509, 513-14 n.5 (1982).

⁸² The statute only states that an application "shall not be granted" in case of non-exhaustion. A few cases have taken this at face value, holding that exhaustion is not a prerequisite to denial on the merits. See *Kelly v. Maroney*, 414 F.2d 1228, 1231 (3d Cir. 1969); *Drew v. Myers*, 327 F.2d 174, 182-83 (3d Cir. 1964); *In Re Ernst's Petition*, 294 F.2d 556, 561-62 (3d Cir. 1961). See also *Shapiro*, *supra* note 33, at 359 n.202. But see *Trantino v. Hatrack*, 563 F.2d 86, 95-97 (3d Cir. 1977), cert. denied, 435 U.S. 928 (1978) (indicating stricter view of exhaustion requirement).

⁸³ The determination of the exhaustion issue can be as burdensome as a determination of the merits. See P. Robinson, *supra* note 26, at 19.

eral levels have had to consider his claims; and the petitioner himself discovers that years of waiting have been for naught when an adverse decision on the merits is finally obtained from the Federal court. Had the Federal court denied his petition on the merits when it was first presented, this needless expenditure of time and effort would have been avoided.

Permitting denial of relief on the merits in such cases, as the bill would allow, would neither frustrate nor undermine the policies supporting the exhaustion requirement. These policies—comity, deference to State processes, and the desirability of allowing State courts to correct errors in state proceedings—are not offended by the denial of frivolous petitions prior to exhaustion. No incentive would be created for a petitioner to by-pass available State remedies and go directly to Federal court, since only an unfavorable result would be possible if State remedies were not exhausted. The desirability of affording State courts an opportunity to correct errors in State proceedings would also not be significantly impaired when the lack of merit in the petitioner's claims is apparent and the Federal court's options are limiting to finding that no State-court error occurred.⁸⁴

Hence, denial on the merits, notwithstanding a petitioner's failure to exhaust State remedies, can avoid substantial delays and litigational burdens at the Federal and State levels without impairment of the interests protected by the requirement of prior recourse to State processes. What is called for on the part of the district judge in deciding whether to dismiss a petition for non-exhaustion or consider a denial on the merits under amended § 2254(b) is a pragmatic judgment, taking account of judicial economy at the State and Federal levels and the policies underlying the exhaustion requirement.

B. DEFERENCE TO FULL AND FAIR STATE ADJUDICATIONS

1. Relationship to current law

Proposed 28 U.S.C. § 2254(d) in section 5(c) of the bill would change current law by granting conclusive effect in habeas corpus proceedings to the results of full and fair State adjudications. Under current law, a Federal habeas court may refrain from holding an evidentiary hearing, and State court fact-findings are rebuttably presumed to be correct, if a number of poorly defined conditions are met.⁸⁵ The Federal court, however, is automatically required to make an independent determination of questions of law, and to re-apply the law to the facts, no matter how fully and fairly that has been done in State proceedings.⁸⁶

⁸⁴ See Shapiro, *supra* note 33, at 358-59:

"The wasted effort which results from the exhaustion doctrine, and its burdens on the courts as well as on litigants, lead one to consider whether it should be abandoned. . . . I conclude that, on balance, the requirement should be retained. . . . But the system is plainly not working as well as it should, and a few means for improvement can be suggested. First, it seems unnecessary and even inappropriate to dismiss for lack of exhaustion when a petition is plainly lacking in merit. . . . [T]he exhaustion requirement in habeas corpus . . . seeks to further federal-state comity by allowing the states ample opportunity to consider, and if necessary, to correct their alleged constitutional errors. It is clear that if there has been no such error no deferral of the federal decision should be required."

⁸⁵ See *Townsend v. Sain*, 372 U.S. 293 (1963); 28 U.S.C. § 2254(d).

⁸⁶ See *id.* at 318.

The present unqualified requirement that Federal habeas courts re-adjudicate questions of law and mixed questions of law and fact that State courts have already resolved defies both common sense and sound judicial policy.⁸⁷ As a practical matter, these redundant adjudications seldom produce a different result from that obtained in state proceedings. As Judge Friendly of the Second Circuit Court of Appeals has noted:

My observation of the work of the excellent state courts of New York, Connecticut and Vermont does not suggest that federal determination of * * * [disputed factual issues and the application of recognized legal standards to ascertained facts] * * * is notably better [than a state court determination]. In the vast majority of cases we agree with the state courts, after a large expenditure of judges' and lawyers' time. In the few where we disagree, I feel no assurance that the federal determination is superior. When I am confident that the issue has received real attention and the state trial and appellate judges have been in accord among themselves, I see no sufficient reason to elevate my views over theirs in a close case.⁸⁸

Examination of the historical origin of the current rules of mandatory re-adjudication tends to confirm their arbitrary nature. Prior to the decision of *Brown v. Allen*⁸⁹ in 1953, a contrary rule prevailed under which a petitioner's contentions would not be re-examined by a Federal habeas court if they had been fully and fairly adjudicated in state proceedings.⁹⁰ In *Ex Parte Hawk*,⁹¹ for example, the Court stated:

Where the state courts have considered and adjudicated the merits of * * * [a petitioner's] * * * contentions * * * a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated * * *. But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy * * * or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate * * * a federal court should entertain his petition for habeas corpus, else he would be remediless.⁹²

The current approach of de novo determination of questions of law and re-application of law to fact emerged abruptly in Justice Frankfurter's conclusory statement⁹³ in *Brown v. Allen* that deference to the State courts on non-factual issues is not allowed under the habeas corpus statute.⁹⁴ The statute, however, merely provides

⁸⁷ See generally Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 444-62 (1963).

⁸⁸ Friendly, *supra* note 6, at 165 n. 125.

⁸⁹ 344 U.S. 443 (1953).

⁹⁰ See Bator, *supra* note 87, at 463-65, 493-99.

⁹¹ 321 U.S. 114 (1944).

⁹² *Id.* at 118.

⁹³ See Bator, *supra* note 87, at 500-01.

⁹⁴ See 344 U.S. at 506-08. An equally conclusory statement suggesting that State court decisions of non-factual issues have only persuasive effect in habeas corpus proceedings appeared in

that custody in violation of the Constitution or laws of the United States is a ground on which Federal habeas corpus may be sought.⁹⁵ There is nothing in the statute that determines the effect to be given to prior State adjudications. There is also nothing in the statute that affords any basis for distinguishing unlawful custody based on a mistaken factual determination from unlawful custody based on a mistaken view of Federal law.

Hence, the current approach to re-adjudication of matters previously adjudicated in State proceedings is unjustified in terms of policy, and was unsupported at its inception by history or precedent.

2. The meaning of "full and fair"

Proposed 28 U.S.C. § 2254(d) would replace the existing rules of mandatory re-adjudication with a limited standard of review which would condition the granting of relief on a showing by the petitioner that the State process was inadequate. The specific requirement is a showing that the State adjudication was not "full and fair." The "full and fair" language is presently employed in defining the standard of habeas review in a number of specialized areas, including re-determination of factual questions,⁹⁶ review of fourth amendment exclusionary rule claims,⁹⁷ and review of court martial proceedings.⁹⁸ It is also, as noted above, the same as that used by the Supreme Court prior to *Brown v. Allen* when describing the general scope of reexamination of claims previously adjudicated in State proceedings.⁹⁹

The "full and fair adjudication" standard of proposed 28 U.S.C. § 2254(d) is not, however, meant to be understood in the sense of any of these other standards employing the same verbal formula. Most of these standards have not acquired a sufficiently definite or detailed meaning for use as a general criterion governing the propriety of re-adjudication. The "full and fair hearing" standard of *Townsend v. Sain* was interpreted in considerable detail in that case, but many of the elements in its interpretation are overly vague, and it was not defined so as to apply to re-determination of the non-factual aspects of a claim.¹⁰⁰ Hence, it is the intent of the Committee that the "full and fair adjudication" language of proposed § 2254(d) be understood as embodying a new concept which consists of the following requirements:

(i) *Decision on the merits.*—For the full and fair adjudication standard of § 2254(d) to apply, the claim presented must have been decided on the merits in State proceedings. If it has not been, the propriety of considering the claim would not depend on the re-adjudication rule of proposed § 2254(d), but on other rules governing

the opinion of the Court in the case. See 344 U.S. at 458: "[W]here there is a material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state's resolution of the issue federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues."

⁹⁵ See 28 U.S.C. § 2241(c)(3).

⁹⁶ See *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963).

⁹⁷ See *Stone v. Powell*, 428 U.S. 465, 494 (1976).

⁹⁸ See *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953). See generally, Strassburg, *Civilian Judicial Review of Military Criminal Justice*, 66 Mil. L. Rev. 1, 25-30, 54-55, 59-60 (1974); *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1208-09 (1970).

⁹⁹ See *Ex Parte Hawk*, 321 U.S. 114, 118 (1944).

¹⁰⁰ See Habeas Corpus Reform Act Hearing, *supra* note 1 at 94-98.

access to Federal habeas corpus, such as the rules governing the requirement of exhaustion of State remedies or the rules governing the excuse of procedural defaults in State proceedings.

(ii) *Reasonableness*.—A State adjudication would not be full and fair in the intended sense if the determination arrived at did not meet a minimum standard of reasonableness. Specifically, the determination must reflect a reasonable interpretation of Federal law, a reasonable view of the facts in light of the evidence presented to the State court, and a reasonable disposition in light of the facts found and the rule of law applied.¹⁰¹

This requirement—reasonableness of the determination—is the most important element in the definition, in the sense that the habeas court's decision concerning deference to the State court's determination under proposed § 2254(d) is likely to depend in most cases on its application.¹⁰² The following two points should be noted in relation to it:

First, in light of the reasonableness requirement, the limited review contemplated by proposed § 2254(d) could not in any way impair the role of the lower Federal courts in ensuring that the Federal rights of State prisoners are respected in State proceedings, which is the justification normally advanced for Federal habeas review of State judgments. The decision as to whether the State determination was reasonable would, of course, be made by Federal district courts considering habeas corpus petitions and by Federal appellate courts reviewing their judgments or orders in such cases. Hence, deference to the State determination would be required only when, in the Federal courts' own estimation, such differences as they may have with the State courts reflect at most reasonable differences of opinion concerning the interpretation or application of Federal law, or pertinent factual conclusions, in cases in which the proper determination is unclear. The general requirement of deference outside of situations in which this standard

¹⁰¹ If the State court had made express findings of fact and conclusions of law, the reasonableness determination could be carried out straightforwardly. In the absence of express findings and conclusions, review of the claim would be carried out in a somewhat different manner, but would not be significantly more difficult. It would remain open to the petitioner to present to the habeas court the record of the evidence on which the claim was decided in the State proceedings, and for the habeas court to determine whether the State court, taking a reasonable view of Federal law, could reasonably have come to the disposition arrived at in light of the evidence presented to it. A negative answer on this point would mean that the reasonableness requirement was not satisfied, and that the claim was accordingly open to re-adjudication. An affirmative answer would mean that the petitioner had failed to carry his burden of proof in establishing that the State adjudication was not full and fair on grounds of unreasonableness. Re-adjudication would then not be warranted unless the petitioner could establish that the State adjudication was not full and fair in one of the other senses set out in the accompanying textual definition.

The unusual case in which the reasonableness determination cannot be reliably carried out on account of the unavailability of the pertinent portions of the State record is governed by special rules which are discussed in the text accompanying note 113, *infra*.

¹⁰² The Committee is aware that, in light of the reasonableness requirement, the scope of review contemplated under the full and fair adjudication standard of proposed § 2254(d) is more extensive than that presently engaged in by Federal courts in reviewing fourth amendment exclusionary rule claims under the *full and fair litigation* standard of *Stone v. Powell*. See Halpern, *Federal Habeas Corpus and the Mapp Exclusionary Rule After Stone v. Powell*, 82 Colum. L. Rev. 1 (1982). Hence, application of the standard of proposed § 2254(d) in review of fourth amendment exclusionary rule claims would result in fuller re-examination of state determinations of such claims in habeas corpus proceedings than that which presently occurs. This result is not intended. The rule of proposed § 2254(d), in common with the other provisions of the bill, is only intended to mark the outer limits of the Federal courts' authority in granting collateral relief. It is not intended to prevent the courts from imposing additional limitations on the availability of collateral relief or on the scope of review in collateral proceedings.

is satisfied reflects the common sense notion that overturning a state judgment—often years later and after a defendant has been accorded the various remedies and layers of review available in the State courts—should require a finding by the Federal habeas court that something more substantial was amiss in the State proceedings than a mere difference of opinion regarding a matter on which judges may reasonably disagree.

Second, the reasonableness standard applies to review of the legal as well as the factual aspects of claims. Examples of limited, as opposed to *de novo*, review of law appear in other contexts in Federal law.¹⁰³ For example, a Federal appellate court will not consider a claim of trial error to which no objection was made at trial unless it amounts to "plain error." This limiting standard of review extends to pure questions of law, such as the formulation of jury instructions.¹⁰⁴

Another analogy is provided by judicial review of the legality of State executive action in suits for damages pursuant to 42 U.S.C. § 1983. In such suits State executive officials are generally provided with a "good faith" defense or immunity, under which no liability results if the official reasonably believed that his actions were lawful.¹⁰⁵ Hence, the disposition depends not on whether the official was correct in his view of Federal law in the reviewing court's estimation, but on whether his view of Federal law and its implications under the circumstances was reasonable.¹⁰⁶

(iii) *Conformity to Federal procedural requirements.*—A further requirement is that a State adjudication, to be full and fair in the intended sense, must be conducted in a manner consistent with the procedural requirements of Federal law that are applicable to State proceedings. These are, in general, the complex of general and specific procedural rights that fall under the rubric "due process," together with certain procedural rights grounded in the Constitutional requirement of equal protection.¹⁰⁷

(iv) *New evidence and changes of law.*—Readjudication would also be allowed under proposed § 2254(d) if new evidence of substantial importance to the decision of the claim is produced which could

¹⁰³ The policies affecting the scope of review of questions of law by lower Federal courts in habeas corpus proceedings should not be confused with those affecting the scope of review of questions of law on direct review of State judgments in the Supreme Court. *De novo* determination in habeas corpus proceedings, unlike *de novo* determination on direct review in the Supreme Court, does not produce uniformity in the interpretation of Federal law. The lower Federal courts frequently divide on such questions, and their determinations have no binding effect on the State courts outside of the particular case. See Cover & Aleinikoff, "Dialectical Federalism: Habeas Corpus and the Court," 86 Yale L. J. 1035, 1053 (1977).

¹⁰⁴ See, e.g., *United States v. Frady*, 456 U.S. 152, 162-63 (1982).

¹⁰⁵ See *Wood v. Strickland*, 420 U.S. 308, 316-22 (1975); *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967).

¹⁰⁶ In applying the reasonableness requirement of the "full and fair" standard to questions of law that the Supreme Court has not clearly resolved, it is intended that State courts be allowed to rely on the decisions of the Federal courts of appeals, since no legitimate purpose could be served in allowing one Federal circuit to overturn a State judgment predicated on a rule that would be applied and upheld on appeal in a Federal criminal proceeding in another circuit. See Habeas Corpus Reform Act Hearing, *supra* note 1, at 95. There is, however, no intention to create a conclusive presumption of reasonableness for the views of Federal district judges since the decisions of individual Federal trial judges have a more varying character than those of the courts of appeals and such a rule would result in Federal appellate courts' being constrained in their collateral review of State judgments by the views of individual Federal judges at a lower level. See Comprehensive Crime Control Act Hearings, *supra* note 4 (response of the Department of Justice to questions proposed by Senator Biden concerning title VI of S. 829, at 4-5).

¹⁰⁷ See, e.g., *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Roberts v. LaVallee*, 389 U.S. 40 (1967) (right of indigents to free transcripts grounded in equal protection).

not have been obtained through the exercise of reasonable diligence at the time of the State adjudication. Similarly, a subsequent retroactively applicable change of Federal law of substantial importance which is binding on the courts of the State would permit re-adjudication of the claim.¹⁰⁸

In sum, an adjudication of a claim in State proceedings is full and fair in the sense of proposed § 2254(d) unless—

(1) the adjudication did not involve a decision of the claim on the merits;

(2) the adjudication involved an unreasonable interpretation of Federal law, an unreasonable determination of the facts in light of the evidence presented, or an unreasonable disposition resulting from the application of the law to the facts;

(3) the adjudication was conducted in a manner inconsistent with the procedural requirements of Federal law that are applicable to State proceedings;

(4) new evidence is produced which could not have been produced at the time of the adjudication through the exercise of reasonable diligence, where a reasonable doubt is established that the disposition of the claim would have been the same had such evidence been produced in the State proceedings; or

(5) a retroactively applicable change in Federal law which is binding on the courts of the State has occurred subsequent to the adjudication, where a reasonable doubt is established that the disposition of the claim would have been the same had the changed law been applied in the State proceedings.

3. *Expected benefits*

The Committee believes that replacement of the current rules of mandatory re-adjudication with the "full and fair" standard of proposed § 2254(d) would yield the following benefits:

First, the proposed standard would not share the demeaning character of the current rules, which relegate the highest courts of the States to the status of fact-finding commissioners whose conclusions on purely factual questions will be trusted under certain circumstances, but whose interpretation and application of law is accorded at best persuasive effect. As Justice O'Connor has stated:

If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions

¹⁰⁸ New evidence is of "substantial importance" in the intended sense if the petitioner establishes reasonable doubt that the disposition complained of would have come about had the evidence been produced in the State proceedings. Similarly, a change of law is of substantial importance if reasonable doubt is established that the disposition would have been the same had the changed law been applied in the State proceedings. *Cf.* text accompanying note 44 *supra* (definition of "prejudice" in standard governing effect of procedural default).

where a *full* and *fair* adjudication has been given in the state court.¹⁰⁹

Second, the current rules can require difficult, if not arbitrary, decisions as to whether a particular State court determination is purely one of fact or reflects an application of law to fact, since the rule governing re-adjudication of factual questions (deference allowed under certain circumstances) differs from that governing re-adjudication of mixed questions of law and fact (re-adjudication uniformly mandated).¹¹⁰ Since the "full and fair" standard would apply the same criterion of "reasonableness" to review of both factual and non-factual determinations, such hairsplitting distinctions would no longer be required.

Third, the proposed reform would further the interests of finality and judicial economy. It would do so by reducing the incidence of successful petitions based on the decision of close questions, and by shortening and simplifying litigation in habeas corpus proceedings, whether or not a favorable outcome would ultimately occur under the current rules.¹¹¹

C. PRESUMED CORRECTNESS OF STATE FACTFINDING

Proposed § 2254(e) in section 5(b) of the bill would simplify current § 2254(d), which is verbose, confusing and obscure, and bring its formulation into conformity with that of the proposed new subsection (d). Proposed subsection (e) would provide specifically that a State court's full and fair determination of a factual issue is presumed to be correct. The presumption could be rebutted by clear and convincing evidence. The intended interpretation of the "full and fair" language is the same as that of the corresponding language in proposed subsection (d), insofar as the definition set out earlier is applicable to the determination of factual issues. Hence, a State court factual determination is "full and fair" in the intended sense unless:

- (i) the determination was unreasonable in light of the evidence presented to the state courts;
- (ii) The process by which the determination was arrived at was inconsistent with the procedural requirements of Federal law that are applicable to state proceedings; or
- (iii) new evidence is produced which could not have been produced at the time of the making of the determination through the exercise of reasonable diligence, where a reasonable doubt is established that the determination would have been the same had such evidence been produced in the State proceedings.

The impact of proposed subsection (e) would be a minor one, since under proposed subsection (d) the results of a full and fair State adjudication could not be overturned. However, there are certain narrow situations in which proposed subsection (e) would apply. To satisfy the standard of proposed subsection (d), both the

¹⁰⁹ O'Connor, *Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge*, 22 William and Mary L. Rev. 801, 814-15 (1981). See Bator, *The State Courts and Federal Constitutional Litigation*, 22 William and Mary L. Rev. 605 (1981).

¹¹⁰ See e.g., *Sumner v. Mata*, 449 U.S. 539, 555-59 (1981) (Brennan, J., dissenting).

¹¹¹ See notes 19-20 and accompanying text *supra*.

non-factual and factual aspects of the petitioner's claim must be fully and fairly adjudicated. If, for example, the rule of law applied by a State court in deciding a petitioner's claim reflected an unreasonable view of Federal law, the state adjudication would not be considered full and fair. The claim would accordingly be open to re-examination by the Federal habeas court. Notwithstanding the unreasonableness of the legal determination, there might be no proof that the treatment of the factual issues raised by the claim had not been full and fair. The rule provided by proposed § 2254(e) for this narrow type of situation is that the State court's determination of the facts is presumed to be correct, but the petitioner may overcome this presumption by clear and convincing evidence.¹¹²

D. REDESIGNATED PROVISIONS—AVAILABILITY AND ADMISSIBILITY OF STATE RECORDS

The bill carries forward without amendment current 28 U.S.C. § 2254(e), subject to a change of its designating letter from "(e)" to "(f)". The provision addresses generally the production of State records and the unusual case in which such records have been lost or cannot be produced for some other reason. It provides in substance that if the petitioner challenges the sufficiency of the evidence to support a factual determination of the State court, and the pertinent part of the State record cannot be produced, then the normal rules of deference to State court determinations do not apply. In such a case "the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination."

This provision is equally germane in the context of the changed rules contemplated by the bill. The applicability of the rules of deference in proposed § 2254(d) and proposed § 2254(e) depends on whether the State adjudication or determination was "full and fair." This includes a determination by the habeas court of whether the State court's factual conclusions were reasonable in light of the evidence presented to the State court.¹¹³ If the record of the pertinent evidence has not been preserved by the State, this determination would necessarily be difficult or impossible. Since it is the State's responsibility to preserve the records of criminal proceedings, it is proper to provide that the normal rules of deference do not apply when it has failed to do so.

The bill also carries forward without amendment current 28 U.S.C. § 2254(f), subject to a change of its designating letter from

¹¹² The reasoning behind this approach is as follows: On the one hand, in the case posed, no specific showing was made that the State court's determination of the facts was not full and fair. This would support a rule of deference to the State factual determination. On the other hand, the fact that the State court adopted an unreasonable view of Federal law adverse to the petitioner might in itself afford grounds for a cautious attitude concerning the reliability of its associated fact-finding. This would support allowing the facts to be re-determined. Proposed 28 U.S.C. § 2254(e) accommodates these competing considerations by creating a presumption of correctness for the State fact-finding in such a case, but allowing the petitioner to overcome it if he can carry an elevated burden of proof.

¹¹³ See text accompanying note 101 *supra*.

"(f)" to "(g)". The provision provides for the admission of official State records and other reliable indicia of the State court's factual determinations. Retention of this provision is not, of course, intended to limit the admissibility of State records pertinent to the determination of non-factual issues by the State court.

VIII. SECTION 6 OF THE BILL—PROPOSED AMENDMENTS TO 28 U.S.C. § 2255 RELATING TO APPEAL, PROCEDURAL DEFAULTS, AND THE TIME FOR MAKING § 2255 MOTIONS

Section 6 of the bill would amend 28 U.S.C. § 2255. The justifications for the amendments are essentially the same as those for the corresponding changes in habeas corpus procedures effected by the earlier sections. They also serve to maintain the general conformity of standards for Federal collateral proceedings involving Federal and State prisoners. As Justice O'Connor observed for the Supreme Court in *United States v. Frady*:

[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments. In addition, a federal prisoner * * * unlike his state counterparts, has already had an opportunity to present his federal claims in federal trial and appellate forums. * * * [W]e see no basis for affording federal prisoners a preferred status when they seek post-conviction relief.¹¹⁴

The deletion of the penultimate paragraph of 28 U.S.C. § 2255 by section 6 is incidental to the amendment of 28 U.S.C. § 2253 effected by section 3 of the bill. Since appeal in § 2255 motion proceedings would be addressed explicitly in amended § 2253, there would be no need for a statement in § 2255 that an appeal in proceedings pursuant to that section is to be as from a final judgment on application for a writ of habeas corpus.

The first paragraph that would be added at the end of § 2255 by section 6 of the bill specifies that the cause and prejudice standard also applies to procedural defaults in Federal criminal adjudications.¹¹⁵ The express definition of cause and the intended definition of prejudice are the same as in the case of State procedural defaults.¹¹⁶

The second paragraph that would be added by section 6 of the bill creates a limitation period that normally runs from finality of judgment, that is, from the time remedies on direct review are exhausted or the time for seeking direct review has expired.¹¹⁷ The limitation period is two years rather than one year since the time

¹¹⁴ 456 U.S. 152, 166 (1982).

¹¹⁵ This follows current law. See *United States v. Frady*, 456 U.S. 152 (1982).

¹¹⁶ See notes 43-53 and accompanying text *supra*.

¹¹⁷ Section 2255 provides that a federal prisoner may apply for a writ of habeas corpus if the motion remedy of that section "is inadequate or ineffective to test the legality of his detention." In the context of the proposed amendments to § 2255, the fact that the limitation period has expired should not be taken as making the motion remedy "inadequate or ineffective." A contrary interpretation would make habeas corpus freely available to Federal prisoners two years after finality, defeating the purpose of the limitation period.

afforded to the defendant is not in addition to the time allowed by State law for pursuit of State collateral remedies—as may be the case with habeas corpus applications under the amendments of section 2 of the bill—but starts immediately when the judgment becomes final.

IX. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., August 31, 1983.

HON. STROM THURMOND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1763, the Reform of Federal Intervention in State Proceedings Act of 1983, as reported by the Senate Committee on the Judiciary, August 4, 1983. The bill requires an applicant to exhaust all possible remedies available in state courts before the issuing of a writ of habeas corpus may be considered by a Federal court, places new limits on the time during which collateral relief may be sought, and amends the appellate process governing habeas corpus.

S. 1763 would reduce the number of cases coming before federal courts. However, because there is currently a backlog of cases in the federal court system, the reduction in caseload would not result in any significant cost savings. Enactment of this bill would not significantly affect the budgets of state and local governments.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

X. REGULATORY IMPACT STATEMENT

In compliance with paragraph 5, Rule XXVI of the Standing Rules of the Senate, it is hereby stated that the Committee anticipates that the bill will have no additional direct regulatory impact. After due consideration, the Committee concluded that the changes in existing law contained in the bill will not increase or diminish any present regulatory responsibilities of the United States Department of Justice or any other department or agency affected by the legislation.

XI. ACTION BY THE COMMITTEE

On July 26, 1983, the Committee on the Judiciary considered and discussed title VI (Habeas Corpus), of S. 829, the Comprehensive Crime Control Act of 1983. An amendment was considered, as discussed below. On July 26, 1983, by a vote of 12 to 5, the Committee ordered an original committee bill¹¹⁸ reported out with recommendation that it be passed by the Senate, as follows:

¹¹⁸ The Committee ordered reported an original committee bill. Since an original bill may not be reported with cosponsors, the text of the bill approved by the Committee was simultaneously introduced, referred to Committee, and reported (S. 1763)—with cosponsors.

Yeas (12)

Laxalt
Hatch
Dole ²
Simpson
East
Grassley
Denton ²
Specter
DeConcini
Baucus
Heflin
Thurmond

Nays (5)

Mathias
Biden
Kennedy
Metzenbaum ²
Leahy ²

The following amendment was defeated by roll call vote, as indicated:

1. Baucus Amendment to delete section 605(b) from title VI.

Yeas (7)

Mathias ²
Biden
Kennedy
Metzenbaum
DeConcini
Leahy ²
Baucus

Nays (10)

Laxalt
Hatch
Dole ²
Simpson
East
Grassley
Denton ²
Specter
Heflin
Thurmond

² By proxy.

XII. CHANGES IN EXISTING LAW

In compliance with subsection (12) of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1763 are as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in *italic*, existing law in which no change is proposed is shown in roman.

UNITED STATES CODE

* * * * *

TITLE 28.—JUDICIARY AND JUDICIAL PROCEDURE

* * * * *

CHAPTER 153—HABEAS CORPUS

Sec.

2241. Power to grant writ.
2242. Application.
2243. Issuance of writ; return; hearing; decision.
2244. Finality of determination.
2245. Certificate of trial judge admissible in evidence.
2246. Evidence; depositions; affidavits.

- Sec.
 2247. Documentary evidence.
 2248. Return or answer; conclusiveness.
 2249. Certified copies of indictment, plea and judgment; duty of respondent.
 2250. Indigent petitioner entitled to documents without cost.
 2251. Stay of State court proceedings.
 2252. Notice.
 2253. Appeal.
 2254. State custody; remedies in Federal Courts.
 2255. Federal custody; remedies on motion attacking sentence.
- * * * * *

§ 2244. Finality of determination

* * * * *

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d) *When a person in custody pursuant to the judgment of a State court fails to raise a claim in State proceedings at the time or in the manner required by State rules of procedure, the claim shall not be entertained in an application for a writ of habeas corpus unless actual prejudice resulted to the applicant from the alleged denial of the Federal right asserted and—*

(1) the failure to raise the claim properly or to have it heard in State proceedings was the result of State action in violation of the Constitution or laws of the United States;

(2) the Federal right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

(e) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of the following times:

(1) the time at which State remedies are exhausted;

(2) the time at which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.

* * * * *

[§ 2253. Appeal

[In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

[There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

[An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.]

§ 2253. Appeal

In a habeas corpus proceeding or a proceeding under section 2255 of this title before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, or from the final order in a proceeding under section 2255 of this title, unless a circuit justice or judge issues a certificate of probable cause.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

[(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.]

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is

either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the applicant. An application may be denied on the merits notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the States.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that has been fully and fairly adjudicated in State proceedings.

[(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

[(1) that the merits of the factual dispute were not resolved in the State court hearing;

[(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

[(3) that the material facts were not adequately developed at the State court hearing;

[(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

[(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

[(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

[(7) that the applicant was otherwise denied due process of law in the State court proceeding;

[(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination, of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such fac-

tual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.】

(e) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a full and fair determination of a factual issue made in the case by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting this presumption by clear and convincing evidence.

【e】 *(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.*

【f】 *(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.*

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

【A motion for such relief may be made at any time.】

* * * * *

【An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.】

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

When a person fails to raise a claim at the time or in the manner required by Federal rules of procedure, the claim shall not be entertained in a motion under this section unless actual prejudice resulted to the movant from the alleged denial of the right asserted and—

(1) the failure to raise the claim properly, or to have it heard, was the result of governmental action in violation of the Constitution or laws of the United States;

(2) the right asserted was newly recognized by the Supreme Court subsequent to the procedural default and is retroactively applicable; or

(3) the factual predicate of the claim could not have been discovered through the exercise of reasonable diligence prior to the procedural default.

A two-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of the following times:

(1) the time at which the judgment of conviction becomes final;

(2) the time at which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, where the movant was prevented from making a motion by such governmental action;

(3) the time at which the right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is retroactively applicable; or

(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

* * * * *

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

[RULE 22. HABEAS CORPUS PROCEEDINGS

[(a) **Application for the Original writ.** An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

[(b) **Necessity of Certificate of Probable Cause for Appeal.** In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may

then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.】

Rule 22. Habeas Corpus and §2255 Proceedings

(a) Application for an Original Writ of Habeas Corpus. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

(b) Necessity of Certificate of Probable Cause for Appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court, and in a motion proceeding pursuant to section 2255 of title 28, United States Code, an appeal by the applicant or movant may not proceed unless a circuit judge issues a certificate of probable cause. If a request for a certificate of probable cause is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a State or the government or its representative, a certificate of probable cause is not required.

* * * * *

